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SEX-BLIND, SEPARATE BUT EQUAL, OR ANTI-SUBORDINATION? THE UNEASY LEGACY OF *PLESSY V. FERGUSON* FOR SEX AND GENDER DISCRIMINATION

Lucinda M. Finley[†]

INTRODUCTION

As *Plessy v. Ferguson*¹ reaches its century mark, it is often excoriated as a shameful historical relic, exemplifying a dark moment in our constitutional history. The majority opinion's supposed interment forty-two years ago in *Brown v. Board of Education*,² and the assumed triumph of the view espoused in Justice Harlan's dissent, is widely celebrated. Yet when one focuses on the jurisprudence of equality on the basis of sex or gender, it appears that far from being buried, *Plessy* is quite alive and well. The "separate but equal" doctrine, *Plessy*'s badge of infamy, has remained viable in the area of sex-segregated education, as illustrated by the current litigation over the male-only admission policies of the Virginia Military Institute (VMI) and The Citadel.³ While the persistence of separate but equal is

[†] Professor of Law, S.U.N.Y at Buffalo Law School. This Article was written for the Symposium on *Plessy v. Ferguson: After One Hundred Years*, held March 28-29, 1996 at the Georgia State University College of Law. The Author would like to thank Professor Stephen Wermiel of the Georgia State University College of Law, who conceived of the Symposium and devoted great effort to nurture it to fruition. The Author would also like to thank Dianne Avery, whose prodigious research to unearth the myths of the VMI tradition taught me so much and jump-started my thinking for this Article, and Susan Hughes, J.D. 1996, S.U.N.Y at Buffalo Law School, for her excellent research assistance.

1. 163 U.S. 537 (1896).

2. 347 U.S. 483 (1954).

3. Virginia Military Institute (VMI) and The Citadel are state-supported all-male colleges, which employ a military style of discipline and physical rigor to produce "citizen-soldiers" destined to become leaders in the private and governmental sectors. The U.S. Justice Department, acting on a complaint by an unidentified woman who was denied admission to VMI, challenged the exclusion of women. *United States v. Commonwealth of Virginia (VMI I)*, 766 F. Supp. 1407 (W.D. Va. 1991), *rev'd and remanded*, 976 F.2d 890 (4th Cir. 1992). In the liability phase of the case, the district court initially found that VMI's policy was justified by "educational diversity," and did

often presumed to be the only lingering vestige of *Plessy*, many of the central premises in contemporary sex equality jurisprudence have their direct counterparts in the one-hundred-year-old majority opinion.

The race essentialism of *Plessy* is quite similar to the sex essentialism that underlies courts' efforts to identify "real" differences between men and women. The separate spheres ideology that flows from essentializing differences is palpable in *Plessy* and equally evident in our understandings of sex equality. A formalistic vision of equality—one that leaves unquestioned the underlying societal norm that has led to the problem in the first place—informs *Plessy* and many instances of the "similarly situated" or "anti-differentiation" approach to sex equality. Like

not violate the equal protection clause. *Id.* This holding was reversed by the Fourth Circuit, because the state could not justify providing the single-sex military training option only to men. *Id.* On remand, at the remedy phase of the case, the district court found that Virginia's creation of a parallel leadership training program for women only, the Virginia Women's Institute for Leadership (VWIL), satisfied the intermediate scrutiny standard of equal protection review of sex-based classifications. *United States v. Commonwealth of Virginia (VMI II)*, 852 F. Supp. 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *reh. denied*, 52 F.3d 90 (4th Cir. 1995). The Fourth Circuit affirmed. *Id.* Both sides petitioned for a writ of certiorari to the U.S. Supreme Court; VMI sought review of the liability determination, and the United States challenged the remedy. The Supreme Court granted certiorari, 116 S. Ct. 281 (1995), and the case was argued on January 17, 1996.

The litigation against The Citadel was initiated by Shannon Faulkner, a woman who was initially admitted when she submitted an application that deleted all references to her sex, but was rejected when her gender was revealed. *Faulkner v. Jones*, 10 F.2d 226, 229 (4th Cir. 1993). On the authority of the VMI case, the district court found that the male-only admission policy violated the Constitution, and the Fourth Circuit affirmed a preliminary injunction that allowed Faulkner to attend day classes. *Id.* When South Carolina failed to develop a parallel women's program in time to apply to Faulkner, the court ordered her admitted to the full cadet program at The Citadel. 858 F. Supp. 552 (D.S.C. 1994), *aff'd*, 51 F.3d 440 (4th Cir. 1995). After Faulkner withdrew from The Citadel in the Fall of 1995, another woman, Nancy Mellette, intervened in the litigation and is continuing to prosecute, seeking a permanent end to the male-only admission policy. See Amicus Curiae Brief for Petitioner United States, *United States v. Commonwealth of Virginia (U.S.)* (Nos. 94-2107, 94-1941) (filed Nov. 16, 1995).

The VMI litigation and its parallels to the "separate but equal" doctrine of *Plessy* are discussed in Julie M. Amstein, *United States v. Virginia: The Case of Coeducation at Virginia Military Institute*, 3 AM. U. J. GENDER & L. 69 (1994); Juliette Kayyem, *The Search for Citizen-Soldiers: Female Cadets and the Campaign Against the Virginia Military Institute*, 30 HARV. C.R.-C.L. L. REV. 247 (1995); Brian Yablonski, *Marching to the Beat of a Different Drummer: The Case of the Virginia Military Institute*, 47 U. MIAMI L. REV. 1449 (1993); Bennett L. Saferstein, Note, *Revisiting Plessy at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 637 (1993).

the majority in *Plessy*, most sex equality jurisprudence has failed seriously to wrestle with or wholly adopt the anti-subordination or anti-caste principle that is at the heart of Justice Harlan's dissent. Using the VMI and Citadel litigation as a frame for analysis, this Article will examine each of these *Plessy*-like foundations of sex equality doctrine.

I. RACE ESSENTIALISM IN *PLESSY*, SEX ESSENTIALISM TODAY

By race essentialism or sex essentialism I mean the conflation of biological, or anatomical or physiological, difference with the legal and social construction of and meaning assigned to presumed difference. Differences emanating from legal policies, institutional practices, cultural attitudes, and socialization are attributed, instead, to biology. This is a process of naturalizing difference, of seeing differences of race or sex as "real." Corollary to seeing such differences as natural is seeing them as more important or all-encompassing than any other differences. Thus, essentialism is also a process that obliterates differences among women, and among blacks. Gender essentialism, for example, rests on the notion that a unitary "essential" women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.⁴

A. *The Plessy Rationale*

This view of racial differences as inherent and natural and thus existing outside of law was central to the *Plessy* case. Homer Plessy sat in the railroad car reserved for members of the white race not only because he was a civil rights pioneer seeking to disrupt and change the social order; he also claimed that he was "really" white because he looked white and socially identified as white.⁵ But because he was an octoroon—a person of seven-eighths Caucasian blood and one-eighth African blood⁶—he was classified under the laws of Louisiana as colored.⁷ Thus, Plessy's

4. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990).

5. *Plessy v. Ferguson*, 163 U.S. 537, 538 (1896).

6. *Id.* at 539-40.

7. Louisiana maintained its racial classification laws into the early 1980s. The statute declaring that anyone with more than one-thirty-second negro blood was officially colored was not repealed until 1983. See Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U.

racial classification was not based on any physiological difference such as skin color, but was entirely dependent on a legal choice of the state to essentialize and give social meaning to drops of blood.⁸ Plessy's racial categorization and his legal classification as different from "true" whites was entirely dependent on the legal classification and social attitudes and practices of the time. He was not legally allowed to "pass," to break out of his ascribed racial category, because the role of the law in constructing that category was obliterated. His race was seen as a "natural" thing, as a biological and "real" difference that both justified the racial separation statute and stood as an inevitable barrier to social change. As Justice Brown's opinion stated, the legal distinction in the Louisiana statute rested on "a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color," and the legal recognition of this "natural" difference created no inequality.⁹ Indeed, it would be useless and even pernicious for the law to attempt to overcome natural differences: "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation."¹⁰

B. *The History of Sex Essentialism*

The history of sex equality jurisprudence is replete with similar themes of the natural differences between men and women, and the concomitant naturalness or inevitability of

PA. L. REV. 1, 55-56 & n.232 (1995).

8. See, e.g., *Jones v. State*, 47 So. 100 (Ala. 1908). The Alabama court distinguished the question of whether a woman "looked white" from the question of whether she "was white." *Id.* *Jones, Plessy*, and other cases resting on state racial classification laws using the legal metaphor of blood to essentialize racial identity are discussed in Eva Saks, *Representing Miscegenation Law*, 8 RARITAN 39 (1988).

9. *Plessy*, 163 U.S. at 543.

10. *Id.* at 551. The naturalness of color distinctions was also used during the *Plessy* era to justify segregation in education and other aspects of social life. For example, a Missouri court, writing six years before *Plessy* to find segregated education constitutional, noted that "color carries with it natural race peculiarities which furnish the reason for the classification. There are differences in races . . . not created by human laws, some of which can never be eradicated." Cynthia Lewis, Comment, *Plessy Revived: The Separate But Equal Doctrine and Sex-Segregated Education*, 12 HARV. C.R.-C.L. L. REV. 585, 611-12 (1977) (quoting *Lehew v. Brummel*, 15 S.W. 765, 766 (Mo. 1891)).

statutes that barred women from numerous occupations, including law.¹¹ While several contemporary cases refer to these earlier cases as discredited relics of the days when "archaic" stereotypes about women's difference from men permeated the law,¹² the touchstone of contemporary sex equality doctrine is still the search for "real" differences between men and women.¹³ As the Fourth Circuit summarized in *The Citadel* case, *Faulkner v. Jones*,¹⁴ classifications based on gender are not subject to strict equal protection scrutiny "due to the acknowledged differences between males and females," and "[l]egislative distinctions based on gender may thus be justified by an important governmental interest in recognizing demonstrated differences between males and females."¹⁵

Yet, just as with race essentialism, the institutional structures, social practices, and culturally prescribed roles that give social meaning to "man" and "woman" are often ignored, left invisible under the surface of a facile attribution to biology.¹⁶ As Katherine Franke recently argued, "biology operates as the excuse or cover for social practices that hierarchize individual members of the social category 'man' over individual members of the social category 'woman.' In the end, biology or anatomy serve as metaphors for a kind of inferiority that characterizes society's view of women."¹⁷ Thus, the courts have often upheld sex-based

11. See, e.g., *Goesart v. Cleary*, 335 U.S. 464 (1948); *Muller v. Oregon*, 208 U.S. 412 (1908); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872). For commentary on this era of "protecting women" out of jobs because of their "delicate condition" see, DEBORAH RHODE, *JUSTICE AND GENDER* 9-28 (1989); Nadine Taub & Elizabeth Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *POLITICS OF LAW* (D. Kairys ed., 1st ed. 1982).

12. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1422-24 (1994); *Craig v. Boren*, 429 U.S. 190, 198-99 (1976); *Schlesinger v. Ballard*, 419 U.S. 498, 506-07 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973) (plurality opinion).

13. See, e.g., Ann Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 95 (1984).

14. *Faulkner v. Jones*, 10 F.3d 226, 231 (4th Cir. 1993).

15. *Id.*

16. For explorations of how this process works in the social sciences, natural sciences, and law, see CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* (1988); ANNE FAUSTO-STERLING, *MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN* (1985); CAROL TAVRIS, *THE MISMEASURE OF WOMEN* (1992); Herma Hill Kay, *Perspectives on Sociobiology, Feminism, and the Law*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 74 (Deborah Rhode ed., 1990).

17. Franke, *supra* note 7, at 3.

classifications as justified by "real," or biology-based differences, between men and women when the naturalness of the presumed difference was in fact quite illusory.

For example, in the mid-1980s decision in *Rostker v. Goldberg*,¹⁸ the Supreme Court upheld a statute subjecting only men to the draft as justified by the "real" difference that men were eligible for and capable of combat, while Congress excluded women from combat due to their biological unsuitability stemming from their family role, and the potential sexual disruptiveness of introducing women into the military field.¹⁹ The unspoken premise of the case seemed to be that the underlying congressional exclusion of women from combat was entirely consistent with the constitutional guarantee of equality, because here was a fundamental, "real" difference between the sexes. The fact that within the next ten years women were successfully performing modern combat roles and that the combat exclusion has now largely been lifted demonstrates the fallacy of these supposedly fixed and natural differences. The deep cultural stereotypes about women's physical and mental capabilities, courage, endurance, and honor, and the gendered notions of proper social roles were left unexamined in the Court's rush to embrace an apparently "real" difference.

Also, in the mid-1980s, in *Michael M. v. Sonoma County Superior Court*,²⁰ the Supreme Court rejected an equal protection challenge to a statute that made sex with a minor a crime only for males. The justification for sex-specific statutory rape laws, according to the Court, was the basic biological fact that women get pregnant and men do not.²¹ Thus, the Justices reasoned, nature burdens the act of underage sex for women, and the legislative penalty for men served merely to equal the deterrent scales.²² Moreover, "[b]ecause males alone can 'physiologically cause the result which the law properly seeks to avoid[—teenage pregnancy—],' . . . the gender classification was readily justified as a means of identifying offender and victim."²³

18. 453 U.S. 57 (1981).

19. For an analysis of Congress's reasons for excluding women from combat, see Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

20. 450 U.S. 464 (1981).

21. *Id.* at 471.

22. *Id.* at 467.

23. *Id.* (quoting *Michael M. v. Sonoma County Superior Court*, 601 P.2d 572, 574

Again left unexamined in this biologically essentialist reasoning were several historical layers of cultural construction. First, prevention of teenage pregnancy was never the basis for statutory rape laws, but was a patently transparent post-hoc rationalization developed by California for the litigation. Rather, sex-specific statutory rape laws were rooted in notions about women as men's property, and about preserving women's virginity until marriage to secure patrilineal property succession.²⁴ They were also rooted in cultural stereotypes about men as sexual aggressors, and women, especially young women, as passive and victimized, but never appropriately sexual agents.²⁵

Sex-based biological essentialism was also readily apparent in the late-1970s case of *Dothard v. Rawlinson*.²⁶ In language reminiscent of nineteenth century cases protecting women out of occupations because of their biological "delicacy," the Supreme Court upheld the exclusion of women from the job of prison guard in all-male prisons because of the real, physiologically based difference of their vulnerability to sexual assault.²⁷ In one of its most remarkable conflation of notions about gender roles with biological sex, the Court remained utterly blind to the reality of male-on-male sexual assault in prison, as well as nonsexualized assaults. To the extent that male prisoners might more readily respect the authority of male guards, it would not be due to biology, but to cultural stereotypes about masculine power and fear of violent retaliation. Further highlighting the biological fallacy underlying the Court's reasoning, in an ironic modern twist, some recent studies have concluded that women, or people who employ feminine conflict resolution and authority styles, can be more effective as law enforcement officers because they listen and defuse, rather than react with violent means of showing authority.²⁸

(Cal. 1979)).

24. Fran Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

25. See, e.g., Williams, *supra* note 19.

26. 433 U.S. 321 (1977).

27. *Id.* at 335.

28. See, e.g., the Report of the Christopher Commission, which was established after the Rodney King incident to investigate the prevalence of excessive force in the Los Angeles Police Department, cited and discussed in Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 86-91 (1995).

C. *Modern Sex Essentialism*

Lest one be tempted to dismiss these examples as outmoded thinking of ten- and twenty-year-old vintage, some of the most intense reduction of culturally constructed notions about gender roles to "real" immutable differences rooted in essentialist biology has occurred in the current litigation challenging the males-only admission policies of the Virginia Military Institute and The Citadel. Indeed, the reasoning in these two closely related cases is remarkably similar to *Plessy* itself.

A century ago, opining on the purpose of the Fourteenth Amendment, the *Plessy* Court wrote:

[I]n the nature of things [the Equal Protection Clause] could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation . . . do not necessarily imply the inferiority of either race to the other

. . . .

. . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.²⁹

The Fourth Circuit, in finding that VMI's "institutional mission" to train "citizen-soldiers" through particular means justified its males-only admissions policy, evoked these sentiments from *Plessy*.³⁰ Blind conformity to a general notion of equality in the face of societal instincts about physical and role differences between the sexes would run counter to common experience and sound educational policy, the court noted.³¹ It just would not work, it would "accentuate the difficulties of the present situation."³² Faced with these "realities," separation along the "natural" sex line would not create a badge of inferiority, rather, it would be beneficial to each sex:

29. *Plessy v. Ferguson*, 163 U.S. 537, 544, 551 (1896).

30. *VMI I*, 976 F.2d 890, 893 & n.2 (4th Cir. 1992) (citing final report of the Mission Study Committee of the VMI Board of Visitors).

31. *Id.* at 897.

32. *Plessy*, 163 U.S. at 551.

We recognize that all persons are in many important respects different and that they were created with differences, and it is not the goal of the Equal Protection Clause to attempt to make them the same. To apply law to different persons with a mind toward making them the same might result, among other things, in the unequal application of the law.

....

... [We must avoid] impos[ing] a conformity that common experience rejects. Men and women are different, and our knowledge about the differences, physiological and psychological, is becoming increasingly more sophisticated. Indeed, the evidence in this case amply demonstrated that single-genderedness in education can be pedagogically justifiable.

....

... Both men *and* women appear to have benefitted from single-sex education in a materially similar manner. . . . The problems that could be anticipated by coeducation at VMI, which are suggested by VMI generally to arise from physiological differences between men and women, needs for privacy, and cross-sexual confrontations, would not be anticipated in an all-female program with the same mission and methodology as that of VMI.³³

The district court and the Fourth Circuit saw many operative "real differences," rather than overbroad generalizations and stereotypes, to justify keeping VMI for men and establishing a separate women-only leadership education program, the Virginia Women's Institute for Leadership (VWIL).³⁴ Yet, the entire reasoning edifice of the district court and appellate court was propped up by overgeneralizations and reductionist equations of gendered personality type, masculine or feminine, with biological sex. The dual institution plan approved by the courts "was in every detail based on gender stereotypes: The plan assumes, first, a perfect identity between sex and gender and, second, a near perfect dichotomy between genders."³⁵

The ideology of supposedly natural and fixed differences between men and women exerts so powerful a lure on our thinking that the lower courts ignored the fact that virtually all the experts acknowledged making generalizations that did not apply to all men or all women. This crucial concession set aside,

33. *VMI I*, 976 F.2d 890, 895, 897-98 (4th Cir. 1992).

34. *VMI II*, 852 F. Supp. 471 (W.D. Va. 1994).

35. Case, *supra* note 28, at 97-98.

the expert testimony accepted as "fact" by the lower courts reads like the epitome of sex stereotyping: women are physically weaker than men, they are more emotional, they are less confident and suffer from a relative lack of self-esteem, they are less aggressive, and they are more cooperative, care-based in their thinking, and nurturing.³⁶ Men need the brutal, confrontative, stressful, and humiliating treatment of the VMI "rat line" because they "need to have uppityness and aggression beaten out of them."³⁷ Women on the other hand, have less self-confidence and need a supportive experience emphasizing positive motivation.³⁸ As for the supposedly fixed and immutable physical differences between men and women, the lower courts ignored testimony that acknowledged many women could pass the VMI physical fitness tests, and that many men, including close to fifty percent of those admitted to VMI, cannot.³⁹

Particularly notable was the fate of testimony by government expert witness Dr. Carol Jacklin, a professor of psychology and a noted national expert on the psychology of sex differences.⁴⁰ Dr. Jacklin's testimony was the most comprehensive and scientific of the experts who appeared, based on research findings rather than anecdote, impression, and political theory.⁴¹ She

36. The sex-based generalizations contained in the expert testimony are summarized in the Supreme Court amicus curiae brief submitted in support of the United States in the VMI case by the American Association of University Women; the Center for Women Policy Studies; the Program on Gender, Science, and Law; and numerous scholars including Carol Gilligan. Amicus Curiae Brief for Petitioners, *United States v. Commonwealth of Virginia* (U.S.) (No. 94-1941) (filed Nov. 16, 1995) [hereinafter Gilligan Amicus Brief]; see also Brief for Petitioner United States, *United States v. Commonwealth of Virginia* (U.S.) (No. 94-1941) (Nov. 16, 1995); *VMI I*, 766 F. Supp. 1407, 1412-13, 1434, 1439-40 (W.D. Va. 1991) (district court's findings of fact).

37. *VMI II*, 852 F. Supp. 471, 480 (W.D. Va. 1994). This testimony came from Professor Elizabeth Fox-Genovese, an historian of women at Emory University who testified for VMI. For a thorough recounting of the experts' opinions and how the district court selectively used them, see Dianne Avery, *Institutional Myths, Historical Narratives, and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 S. CAL. REV. L. & WOMEN'S STUD. 189 (1996).

38. *VMI II*, 852 F. Supp. at 480.

39. See Avery, *supra* note 37. For a discussion of the variances in VMI's physical education requirements and the dispensations given to some, including varsity athletes and disabled students, see *id.* at 373-84.

40. See *id.* at 298-318.

41. See *id.* at 276-97 for an analysis of which experts, particularly Professor Fox-Genovese, used anecdote and personal impression from some fleeting conversations and which experts relied on research and scientific methodology. See also Gilligan Amicus Brief, *supra* note 36, and the similar amicus brief this group attempted to

consistently emphasized during her testimony that while "[t]here are some average differences between men and women, . . . [these] average differences . . . are trivial compared to the very large individual differences within the group of men and within the group of women."⁴² Again, she stressed that "the variability among females and among males is much larger and far outweighs the average difference between males and females. . . . [G]ender is used as if you could generalize. Gender seems to be used to try to predict many things that aren't well predicted by gender."⁴³

Yet the district judge questioned Dr. Jacklin's credibility because she declared herself a feminist committed to educational equality, and because she acknowledged the basic truth that political positions inevitably creep into scientific research.⁴⁴ Most significantly, the court focused not on the large area of overlap between men and women in studies of cognitive and emotional development, but on the narrow and statistically insignificant bands on bell curves where men's scores and women's scores did not overlap.⁴⁵ In other words, all the court could see was difference between men and women, and all the court could imagine was that any apparent difference was attributable to sex, and not to any other factor. The court could only hear evidence that most comported with, and bolstered, deeply culturally ingrained notions about inherent differences between men and women; these culturally inscribed notions then were characterized not as stereotypes, but as scientific fact.⁴⁶

submit to the Fourth Circuit, *Opposing All-Male Admission Policy at Virginia Military Institute: Amicus Curiae Brief of Professor Carol Gilligan and the Program on Gender, Science, and Law*, reprinted in 16 WOMEN'S RTS. L. REP. 1 (1994). These amicus briefs argue that the experts who testified for VMI, on whom the district court largely relied, did not meet the minimal standard for scientific sufficiency established by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993).

42. Avery, *supra* note 37, at 301.

43. *Id.* at 303.

44. *Id.* at 300.

45. *VMI II*, 852 F. Supp. at 480; Avery, *supra* note 37, at 303-04.

46. Avery, *supra* note 37, at 303-04. This phenomenon of expert testimony, introduced to develop a more nuanced and sophisticated understanding of gender and women's experiences being "misused and misheard to enshrine old stereotypes in a new form," has occurred in many other contexts, including battering and sex segregation in the workplace. Elizabeth M. Schneider, *Hearing Women Not Being Heard: On Carol Gilligan's Getting Civilized and the Complexity of Voice*, 63 FORDHAM L. REV. 33, 34 (1994); Vicki Schultz & Stephen Petterson, *Race, Gender,*

Individual variation, ambiguity, complex human subjects, contingencies of culture, class, race, individual family, the changeability of socialization patterns—all were beyond comprehension as outside the comfortable world view of inherent sex differences. Just as the Court in 1896 could not heed or seriously comprehend the import of Plessy's argument that he was really more like "white" people, many judges today cannot think about sex in terms other than inherent difference that resides "naturally" in individuals.

In addition to the tendency exemplified in the VMI case to ignore evidence that does not fit the preconceived understanding of naturalized difference, this sex essentialist thinking has another powerful limiting effect on the scope of contemporary sex equality jurisprudence. When the point of the legal inquiry is understood to be ferreting out "real" differences rooted in biology and distinguishing them from false stereotypes, this biologicistic pull on the legal thinking makes it difficult to comprehend the multiple forms of abuse against individuals who do not fit their prescribed gender roles as a sex equality or discrimination problem. As Professor Mary Anne Case explains in a recent article, gender discrimination, "that is to say, discrimination against the stereotypically feminine, especially when manifested by men, but also when manifested by women," is still legally and socially acceptable.⁴⁷ Jobs, or schools—like VMI and VWIL—can be structured to comport with masculine stereotypes and feminine stereotypes, and then people of a particular sex can be preferred for the job or school because sex is presumed to be an accurate stand-in for masculinity or femininity.⁴⁸ A man who is

Work and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, 59 U. CHI. L. REV. 1073 (1992); Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2375-78 (1994) ("As with most dominant paradigms, the motivational orientation [that intrinsic sex-based differences cause women to have different job interests or preferences than men] gains its power from being accepted implicitly, rarely being subjected to close scrutiny.").

47. Case, *supra* note 28, at 3.

48. See, e.g., *id.* at 69-74, 81-94; Maxine N. Eichner, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397 (1988); Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 938-40 (1987). The argument that women are naturally "not interested" in jobs structured around masculine stereotypes has often been used to explain or judicially uphold women's underrepresentation in these job categories. See Schultz & Peterson, *supra* note 46; Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the*

harassed out of the workplace for not acting like "one of the boys,"⁴⁹ or who is not hired or is fired because of a perception that he is too effeminate,⁵⁰ does not suffer from discrimination on the basis of his sex. Shannon Faulkner, who suffered the brunt of vicious, sexually derogatory harassment because she was perceived as trying to be masculine,⁵¹ was regarded as failing to endure at The Citadel because she—and by extension all women—was not good enough, not because she was alone in a hostile, pervasively discriminatory environment dead set against her. Just as Plessy was regarded as a criminal for not accepting his "true" racial nature, and for insisting instead "upon going into a coach used by the race to which he did not belong,"⁵² women who aspire to go to VMI or The Citadel are treated as cultural renegades. By trying to succeed at a quintessentially masculine institution, they are attempting to be something they can never be—"real men."⁵³

This equation of masculinity with maleness and femininity with femaleness, and the concomitant notion of "proper place," shows the enduring significance of separate spheres ideology in sex equality jurisprudence. In *Plessy* this ideology was reflected in the unquestioning acceptance of the fact that there were social places where whites belonged, and other social places where other races belonged, naturally. For sex and gender, this ideology is reflected in the traditional assumption that women are more appropriately the ones to tend to the world of family and home,

Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 HARV. L. REV. 1749 (1990); Vicki Schultz, *Women "Before" the Law: Judicial Stories About Women, Work, and Sex Segregation on the Job*, in FEMINISTS THEORIZE THE POLITICAL 297 (Judith Butler & Joan W. Scott eds., 1992).

49. See, e.g., Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2512 (1994) (discussing *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135 (S.D. Tex. 1993) and *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988)); Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 126-31 (1992) (also discussing *Goluszek*, 697 F. Supp. 1452).

50. See, e.g., Case, *supra* note 28, at 46-57 for a discussion of *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325 (5th Cir. 1978), and *Straley v. Happy Times Nursery Sch.*, decided as part of *DeSantis v. Pacific Tel & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

51. Faulkner and her family received death threats. She had her car vandalized, sexist and homophobic graffiti was sprayed on her home, and she was called many sexist epithets that questioned her gender and sexual orientation. See Claudia Brinson, *Shannon Faulkner: Honor on Her Own Terms*, MS. Jan.-Feb. 1996, at 48.

52. *Plessy v. Ferguson*, 163 U.S. 537, 541 (1896).

53. See Franke, *supra* note 7, at 86-87.

while men are the breadwinners and the ones who toil in the messy, boisterous public world.⁵⁴ Because of the law's frequent failure to grasp that culturally inscribed notions of gender roles are what really underlie presumed "real" differences, the separate spheres ideology has not been fully eradicated from contemporary sex equality jurisprudence. In the workplace, job segregation by sex is often understood as reflecting "natural" choices that women make as an outgrowth of their nurturing personalities or in order to accommodate their family responsibilities.⁵⁵ That educational programs like VMI and The Citadel, which are structured around confrontative, assaultive, demeaning treatment and punishing physical demands, are seen as "naturally" more suited for men, while a program like VWIL, which emphasizes cooperation, supportiveness, and nurturing as a way to build esteem, is considered "naturally" suited for women, also reflects the enduring power of the separate spheres ideology. Women who aspire to the quintessentially male program meant to prepare "real men" for the male world of leadership are looked at as oddities, as malcontents who will not accept their place, who misguidedly do not understand that the women's program is "better" for educating them for that place.⁵⁶ As Professor Elizabeth Fox-Genovese, testifying as an expert for VMI, explained, a hypothetical woman might want to go to VMI only if her "ambition in life is to break barriers, climb Everest because it is there But this is high-roller ambition. It's as much fancy as it is reality."⁵⁷ A woman, on the other hand, who accepts that her place is not to break barriers and does not

54. For an explication of the separate spheres ideology and the ways it continues to linger in contemporary equality jurisprudence, see Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986). For a comprehensive historical analysis of this ideology and the way it structured late nineteenth and early twentieth century legal understandings of sex equality, see RHODE, *supra* note 11.

55. See Schultz, *Telling Stories*, *supra* note 48 (analyzing the "lack of interest" defense in Title VII litigation). Richard Epstein has recently argued that biology is the reason sex segregation persists in the workplace because women "naturally" choose those jobs for which they are biologically suited. Richard A. Epstein, *Gender is For Nouns*, 41 DEPAUL L. REV. 981, 997 (1992); see also Franke, *supra* note 7, at 87-89.

56. See Avery, *supra* note 37, at 289.

57. *Id.* at 290.

indulge in such flights of fancy, but who "really wants to become a leader, . . . will be attracted to VWIL."⁵⁸

II. SEPARATE-BUT-NOT-REALY-EQUAL IS ALIVE AND WELL

Because the notions of essentialized, naturalized difference and separate spheres are so well entrenched and often glorified in our cultural thinking about men and women, the separate but equal doctrine of *Plessy*, long banished from race jurisprudence, retains vitality when it comes to sexual segregation. The idea of separating men and women in certain realms, and of some things being more appropriate for one sex than for the other, just does not strike most people as odd, or repugnant to ideals of equality, as does the notion of forced racial separation. When it comes to sex, the notion often seems appropriate, resonating with deeply entrenched cultural notions about the biologically based dissimilarity of men and women, and the inevitable alterity of masculinity and femininity. While this is most apparent in the area of education, it is also evident in the sports arena, and in the maintenance of sex-segregated prisons. Elements of separate but equal thinking are also visible in the maintenance of sex-segregated drug and other sorts of treatment programs, and in the traditional exclusion of women from most medical research into gender-neutral drugs, and their concomitant relegation to being research subjects only for sex-specific drugs, such as female contraceptives, that could not practicably be tested on men.⁵⁹

Just as with separation along racial lines, separate never really means equal. All-girl schools usually have fewer academic offerings, especially in stereotypical male fields such as science, math, and engineering, and are frequently less well endowed financially, and physically.⁶⁰ Women's sports events frequently

58. *Id.* (quoting Professor Fox-Genovese).

59. In each of these areas, women's unique childbearing role, and its presumably unique dangers, have justified the maintenance of separate tracks for women. See, e.g., Vanessa Merton, *The Exclusion of Pregnant, Pregnable, and Once-Pregnable People (A.K.A. Women) From Biomedical Research*, 3 TEX. J. WOMEN & L. 307 (1994).

60. See, e.g., *Vorcheimer v. School Dist. of Philadelphia*, 532 F.2d 880 (3d Cir. 1976), *aff'd mem. by an equally divided Court*, 430 U.S. 703 (1977) (rejecting a challenge to Philadelphia's maintenance of an academically elite high school for boys, and a separate such school for girls, despite notable differences in the educational offerings and resources of each). This disparity in resources proved definitive several years later when the sex-segregated high schools were challenged in state court under the Pennsylvania Equal Rights Amendment. The state court found them to violate the Equal Protection Clause because separate was not really equal. *Newburg v. Board of*

offer less prize money, and the professional opportunities are far fewer, much less compensated, and more likely to be downplayed by the media. At the school level, women's sports teams rarely have the resources, academic free-ride, and alumni networks available to male athletes. Women-only prisons usually offer far less in the way of treatment and training programs.⁶¹ Drug and alcohol or AIDS treatment programs for women, especially pregnant women or women with young children, are usually smaller, with fewer places and fewer resources.

The apotheosis of separate but equal thinking in the educational arena is the VMI litigation.⁶² Based on the presumed differences between men and women, and the presumed benefits of single-sex education to both alike, the lower courts justified creating a new, separate state-funded women's program, the Virginia Women's Institute for Leadership (VWIL), at private, all-female Mary Baldwin College, to remedy the constitutional defect of maintaining a VMI-type education only for men.⁶³ South Carolina, which wishes to maintain The Citadel as an all-male preserve, has proposed a similar separate women's program, the South Carolina Institute for Leadership (SCIL), at the private, all-female Converse College.⁶⁴

Pub. Educ., 478 A.2d 1352 (Pa. Super. Ct. 1984). For discussions of the judicial history of challenges to sex-segregated public education and the frequent disparities between all-male schools and all-female schools, see Lewis, *supra* note 10. See also Saferstein, *supra* note 3.

61. See Rosemary Herbert, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L.J. 1182 (1985). See, e.g., *Klinger v. Nebraska Dep't of Corrections*, 31 F.3d 727 (8th Cir. 1994) (holding that differences between men and women make them not similarly situated under Equal Protection Clause, and thus rejecting challenge to lack of programs for women at women's prison). For a refreshing change to the usual judicial approach to unequal prison opportunities, see *West v. Virginia Dep't of Corrections*, 847 F. Supp. 402 (W.D. Va. 1994), in which an early release boot-camp-type program offered only to men was discriminatory.

62. Numerous commentators have argued that the VMI litigation constitutes a revival of *Plessy v. Ferguson's* separate but equal doctrine. See *supra* note 3; see also Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL'Y 227 (1994); Mary M. Cheh, *An Essay on VMI and Military Service: Yes, We Do Have to Be Equal Together*, 50 WASH. & LEE L. REV. 49 (1993); Charles J. Russo & Susan J. Scollay, Commentary, *All Male State-Funded Military Academies: Anachronism or Necessary Anomaly?*, 82 ED. L. REP. 1073 (1993); William A. DeVan, Note, *Toward a New Standard in Gender Discrimination: The Case of the Virginia Military Institute*, 33 WM. & MARY L. REV. 489 (1992).

63. *VMI II*, 852 F. Supp. 471, 477 (W.D. Va. 1994).

64. See, e.g., *Citadel Offers Plan to Avoid Female Cadets*, N.Y. TIMES, Oct. 7, 1994, at A26. This program will only continue if the end result of the VMI and Citadel litigation is the authorization of separate sex-segregated programs. See Linda L.

These separate women's leadership schools are intentionally quite different from the male models. They will not employ the "adversative method" of the "rat system," in which cadets haze each other and subject each other to dangerous physical and emotional brutality to strip away individuality and bond men together through adversity.⁶⁵ Rather, the women's programs will try to encourage and support, to build confidence through mutual respect, conviviality, and "being nice."⁶⁶ Their physical education programs will be much less rigorous, but deemed to be challenging "enough" for girls.⁶⁷ They will not employ pervasive military acculturation, but will make small-scale ROTC programs available to women.⁶⁸

Actually, the VWIL program sounds much better, more humane, and preferable for everyone—men and women alike. But the States of Virginia and South Carolina have never considered pulling public resources out of the sometimes infantile, brutal, and destructive VMI and The Citadel,⁶⁹ and instead building up the VWIL and SCIL programs and opening them up to interested men as well as women. This option would mean calling "into question the value placed on the traditionally masculine and

Meggett, *Converse Takes Different Approach*, CHARLESTON POST & COURIER, Aug. 31, 1995, at A1. The Fourth Circuit criticized South Carolina for deliberately dragging its feet in establishing a remedial parallel women's program in time to benefit Shannon Faulkner, so it ordered her admitted to the cadet corps at The Citadel. *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995).

65. *VMI I*, 976 F.2d 890, 897 (4th Cir. 1992).

66. A newspaper story about the contrast between the first week at VWIL and the first week facing the new class at VMI highlights these differences. When VMI cadets were teaching VWIL students how to march and salute and a woman made a mistake, she was not taunted, screamed at, and subjected to physical punishment. Instead, she received "prompting smiles and a gentle nudge from the VMI cadet-instructors," who acknowledged, "We're usually not quite as nice." In contrast, at VMI, "newly minted rats . . . were welcomed with a deafening torrent of taunts and jeers from the uniformed upperclassmen, . . . [who] launch[ed] themselves at the freshmen, screaming in their faces, ordering them to jump in place or drop for push-ups Those who made the mistake of not responding fast enough were singled out for even more abusive treatment. By Monday, 25 of the 400 newcomers had quit." Peter Baker, *Cadets Test the Waters: For Women, a Dip, for Men, Immersion at VMI*, WASH. POST, Aug. 31, 1995, at C1.

67. *VMI II*, 852 F. Supp. 471, 478 (W.D. Va. 1994).

68. *Id.* at 494.

69. For fuller examinations of the culture at these schools, highlighting their often perverse brutality, racism, sexism, and homophobia, see Susan Faludi, *The Naked Citadel*, NEW YORKER, Sept. 5, 1995, at 65; Rick Reilly, *What is The Citadel?*, SPORTS ILLUSTRATED, Sept. 14, 1992; PAT CONROY, *THE LORDS OF DISCIPLINE* (1980) (novel based on author's experiences as a student at The Citadel).

elevat[ing] the traditionally feminine into something valuable to both sexes."⁷⁰ But given our cultural valuation of the masculine, VMI and South Carolina have chosen instead to fight to preserve the masculine model for men only. Aided by the courts, this strategy will perpetuate the perception that women, and feminine styles and qualities, are simply not good enough to "play in man's world," and so need to be kept separate, offered little more than a patronizing modern reincarnation of separate but equal.

Perhaps because the idea that "separate but equal" is bad is so ingrained in the post-*Brown v. Board of Education* era, the district judge in the VMI case was derisive of the accusation that the parallel VWIL program was a throwback to the separate but equal era.⁷¹ The separate but equal concept is nothing but sophistry, the judge acknowledged, and the VWIL plan "would surely fail" under that measurement.⁷² If the "equal" part of the equation is taken seriously, as the Supreme Court insisted in rejecting a separate all-black law school in Texas, in *Sweatt v. Painter*,⁷³ VWIL would not pass muster. It could never, the district court judge acknowledged, "supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years."⁷⁴ Nor does it offer the same degree of rigorous physical training or military acculturation, or the famous adversative method of the rat line designed to produce a distinctive type of citizen-soldier.⁷⁵ And, its offerings in the sciences and engineering, and the educational qualifications of its faculty, are but a pale shadow of VMI.⁷⁶

70. Case, *supra* note 28, at 104. As Professor Case notes:

Far from considering making the feminine program available to students of both sexes, however, South Carolina . . . has made clear that, if The Citadel is forced to admit women, the SCIL program will no longer be funded. This unquestioning acceptance of a masculine standard, at least for men if not also for women, or the failure even to consider the possibility of a feminine standard applied sex-neutrally, is one of the central problems of gender discrimination.

Id. at 104 n.367 (citation omitted).

71. See *VMI II*, 852 F. Supp. 471 (W.D. Va. 1994).

72. *Id.* at 475.

73. 339 U.S. 629 (1950).

74. *VMI II*, 852 F. Supp. at 475.

75. *Id.* at 478.

76. *Id.* at 477.

But the district court and Fourth Circuit reasoned that separate but equal was not relevant, or even possible, in the gender area.⁷⁷ The very differences between men and women that justified the segregated institution meant that precisely similar, or equal, programs were neither feasible nor educationally wise.⁷⁸ So, the courts watered down separate but equal to the new doctrine of "substantively comparable," as measured by whether both programs are aimed at producing leaders—one group with a masculine leadership style, another with a feminine style, but leaders nonetheless.⁷⁹ As the Fourth Circuit explained:

[T]he alternatives left available to each gender by a classification based on homogeneity of gender need not be the same, but they must be substantively comparable so that, in the end, we cannot conclude that the value of the benefits provided by the state to one gender tends, by comparison to the benefits provided to the other, to lessen the dignity, respect, or societal regard of the other gender. . . . We do not espouse a 'separate-but-equal' test, . . . [r]ather, the test we utilize would allow separate and *substantively comparable* facilities.⁸⁰

Applying this new test, the Fourth Circuit brushed aside the government's objections based on the extensive disparities between VMI and VWIL. "The missions are similar and the goals are the same," the court noted. Just because "[t]he mechanism for achieving the goals differ[s]—VMI utilizing an adversative and pervasive military regimen and VWIL proposing to utilize a structured environment reinforced by some military training and a concentration on leadership development"—is not constitutionally dispositive, because "the difference is attributable to a professional judgment" of how best to educate men as opposed to women.⁸¹

Perhaps this doctrine of comparability is a practical acknowledgement that separate has never really been equal. But it certainly is no answer to why the women's program should be so much less, and so stereotypically feminized, and why the

77. *VMI II*, 44 F.3d 1229, 1237 (4th Cir. 1995).

78. *Id.*

79. *Id.*

80. *Id.* at 1237 & n.*.

81. *Id.* at 1240-41.

men's program should be allowed to remain not only better endowed, but so virulently masculine. The lower court judges never inquired into the social meaning and perception of VWIL so long as VMI continues in existence. It will undoubtedly be forever relegated to the status of "VMI-lite," the place where girls have to go because they just are not cut out to take the *real* tough, manly citizen-soldier leadership training. The VWIL degree will never have the prestige, historical tradition, and justly famous alumni networks behind it, partly because it is new, but mostly because it is "the girl's degree."

The insistence that the law should be blind to stereotyped, not "real," differences of gender, just as it should be color-blind, is often prescribed as the proper antidote to this sort of *Plessy*-like "girls and boys each have their proper place" separate spheres thinking. The corrective doctrine adopted by sex equality jurisprudence is to presume that women are similarly situated to men in most respects and should not be held back or classified on the basis of "invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."⁸² Yet this "similarly situated" or "sameness" approach to sex equality is not as significant a departure from the fundamental reasoning that informed *Plessy* as one would like to think.

III. SAMENESS, UNEXAMINED NORMS, AND EQUAL RIGHTS ONLY FOR THE EXCEPTIONAL

The vision of sex equality that posits that women are really the same as, or similarly situated to men, unless there is a real, essential difference relevant to the contested classification, has an odd formal abstraction evocative of the formalistic vision of equality underlying *Plessy*. The *Plessy* decision rested on a formalistic concept of equality because it deemed social context and power dynamics irrelevant to the classification at issue. Thus, it presumed a neutrality, or equality of application, that played out quite differently in fact.⁸³ No inequality was created by the Louisiana statute requiring separate train cars for

82. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1422 (1994).

83. See, e.g., Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 227-30 (1991) (analyzing *Plessy* and other Supreme Court racial classification decisions from the first half of the twentieth century as formalistic because the racial classifications did not *formally* disadvantage one racial group vis-a-vis another).

members of each race because the law applied equally to white and black alike. Whites were just as constrained from riding with blacks as the reverse. Any perceived badge of inferiority from this enforced separation came not from the state, reasoned the Court, but "solely because the colored race chooses to put that construction upon it."⁸⁴ This assessment, abstracted from the social meaning and effect of the mandatory segregation, is the hallmark of a formalistic equality analysis because it persistently refuses to examine the underlying social norm that has created the problem.

The similarly situated or sameness model that has permeated contemporary sex equality jurisprudence is similarly formalistic and abstract, with the same persistent inability or refusal to question the underlying norm. Indeed, this conception of the goal of sex equality—to treat women the same as men—has often been criticized for succumbing to a male norm. The standard for assessing women's relative difference is men; those institutional policies, practices, and structures that have been created for men are seen as the aspiration for women who can prove they are "really" just like men. Whether what has been established for men is beneficial for men or women—whether the norm is worth aspiring to or instead needs fundamental change—usually eludes the inquiry of the similarly situated model of equality.⁸⁵

This claim that the posture and underlying vision of most contemporary sex equality arguments and judicial inquiries is evocative of *Plessy* will no doubt produce howls of protest. "We are fundamentally trying to change the baseline of separation, to integrate the railroad car, not to keep it reserved for the privilege of the socially dominant group," the protestors will say, and not without reason. But my claim of reminiscences of *Plessy* is based not on the outcome of cases or the ends being argued for; rather, it rests on an analysis of the underlying vision of the meaning of equality. Are social and institutional norms fundamentally being challenged, or is the goal to open the door to some members of

84. *Id.* at 551. See also Justice Harlan's dissent, in which he noted that counsel for Louisiana argued that the statute created no discrimination because it "prescribes a rule applicable alike to white and colored citizens." *Id.* at 557.

85. For examples of critiques of this concept of equality as being inextricably tied to a male norm, see Finley, *supra* note 48; Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201 (1988); Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Catharine MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED* (1987).

the previously excluded group so that they may assimilate into the prevailing value structures?

Consider the postures and aspirations of the litigants in *Plessy* and in the VMI and Citadel cases. *Plessy* was only partially challenging the prevailing social norm of the legal and social system of subordination of the colored race. He was also claiming that *he* should be treated as an exception to the norm because he was really enough like whites in appearance and social station that he should be regarded as just like whites. He, individually, but not necessarily all "truly" colored, should be entitled to enjoy the rights and privileges secured to whites. Secure to him his proper classification and his rightful place in the railroad car reserved for whites, and he would be content, no matter how many colored men and women remained consigned to the inferior option.

Under similarly situated sex equality arguments, the "exceptional" woman who is "really" like a man should be allowed to participate in what has been secured for men. Thus, in the VMI case, the United States government argued that those women who were more like men than the traditional mold of women, who could meet the physical fitness standards, who could endure the adversative method of the rat line culture, should have the opportunity to do so.⁸⁶ VMI should not have to change in any significant way that would fundamentally alter the core methodology or goals of the program, the government conceded.⁸⁷

This line of argument was simultaneously reflective of and constrained by the prevailing approach in sex equality law. It played right into the hands of reinforcing the unexamined norm as neutral, inevitable, and unyielding. The focus of expert scrutiny, legal argument, and judicial reasoning was on women and the VWIL program created for women—whether they were sufficiently like or unlike men, and whether VWIL was good for women. The norm at issue—VMI itself, its structures, methods, values, and social significance as a means for maintaining

86. See Brief for Cross-Respondent United States (Liability Brief), *United States v. Commonwealth of Virginia* (U.S.) (No. 94-2107) (filed Dec. 15, 1995); see also Avery, *supra* note 37, at 321.

87. Brief for Petitioner United States (Remedy Brief), *United States v. Commonwealth of Virginia* (U.S.) (No. 94-1941) (filed Nov. 16, 1995); see also Avery, *supra* note 37, at 322 (discussing similar arguments in the government brief to the Fourth Circuit).

notions of masculinity and masculine privilege—escaped serious scrutiny. The correctness or naturalness of the male standard of VMI was assumed, and the entire focus of the litigation became whether women could fit in without causing too much alteration of the readily embraced male norm.⁸⁸ The underlying assumption of the lower courts was that VMI should not and could not change, because change would inevitably alter the venerable institution in ways inimical to its very existence.⁸⁹ Judge Kiser in the district court characterized the effort to open VMI up to women “as nothing short of a life and death confrontation.”⁹⁰

This assumption, that changes that might flow from ending gender segregation would be socially disruptive and harmful to an institution presumed to be working well for the dominant group, echoes the same operative assumptions in *Plessy*. The assumption that the unexamined norm was neutral, and the refusal to inquire into its history, context, and social effects, are also evocative of the reasoning in *Plessy*.

Like the majority in *Plessy*, the lower courts in the VMI litigation were unwilling to examine closely the reasons advanced by VMI for needing or wanting to stay all male. Neither the attorneys nor the judges squarely interrogated VMI’s litigation-oriented defense of its traditions or its assertions that it would be destroyed if it admitted women.⁹¹ The Fourth Circuit went so far as to insist it had to adopt a “deferentially cautious” approach to assessing the legitimacy and importance of the institution’s

88. See, e.g., Case, *supra* note 28, at 104 n.367.

89. *VMI II*, 44 F.3d 1229, 1233 (4th Cir. 1995).

90. *VMI I*, 766 F. Supp. 1407, 1408 (W.D. Va. 1991). As Dianne Avery has noted: VMI’s idea that any change should be resisted and all traditions preserved drove much of the VMI litigation, forcing the United States to appear to equivocate about the change it was seeking at VMI. The government was in an awkward position, both politically and with regard to its litigation strategy. Should it argue that women won’t change VMI because women are the same as men? Or should it adopt the position that women will change VMI because women are different? Either way, the Justice Department attorneys would please some feminists and anger others, win over some judges and alienate others. In the end, the United States tried to have it both ways and all ways, a position more than adequately supported by the evidence: admitting women will change VMI in some ways—but not in any ways that will affect its educational mission or traditional principles.

Avery, *supra* note 37, at 323.

91. See Avery, *supra* note 37, at 271.

asserted reasons for remaining all male.⁹² While this willingness to swallow post hoc rationalizations adopted for litigation stands in sharp contrast to the approach the Supreme Court took towards analyzing single-sex higher education in *Mississippi University for Women v. Hogan*,⁹³ it has parallels to the Court's cursory acceptance of historically and contextually phony rationalizations in sex equality cases such as *Michael M. v. Sonoma County Superior Court*⁹⁴ and *Rostker v. Goldberg*.⁹⁵

If the lower courts had been willing to parse the tradition-laden reasons proffered by VMI for remaining all male, they would have seen remarkable historical parallels to the reasons previously advanced in the late nineteenth and early twentieth century to keep women out of prestigious all male colleges. As justifications for male exclusivity, college administrators argued that intermingling of the sexes would bring disruptive sexual thoughts into the educational sanctity of the classroom, or that the familiarity wrought by too much intermingling would destroy romance. Turn-of-the-century educators also vociferously maintained that coeducation ran contrary to natural differences in the cognitive abilities and needs and social aspirations of the two sexes, and would thus diminish the rigor of all male educational programs without corresponding benefits to women.⁹⁶ VMI argued, and the district court agreed, that admitting women would undermine the physical training component of a VMI education by bringing differential treatment and jealousy into the corps.⁹⁷ VMI also successfully asserted that the presence of women would introduce elements of cross-sexual interaction and confrontation that would pollute the learning environment with "additional elements of stress and distraction."⁹⁸ A fundamental sense of decency between the sexes would also be destroyed if women were admitted to VMI, the lower courts opined.⁹⁹ At the remedial stage of the litigation,

92. *VMI II*, 44 F.3d 1229, 1236 (4th Cir. 1995).

93. 458 U.S. 718 (1982); see *VMI II*, 44 F.3d at 1243, 1246-48 (Phillips, J., dissenting).

94. 450 U.S. 465 (1981).

95. 453 U.S. 57 (1981).

96. See RHODE, *supra* note 11, at 292-93; Lewis, *supra* note 10, at 598-620.

97. *VMI I*, 766 F. Supp. at 1413.

98. *VMI I*, 976 F.2d 890, 896 (4th Cir. 1992) (affirming district court findings of *VMI I*, 766 F. Supp. 1407 (W.D. Va. 1991)).

99. See *VMI I*, 766 F. Supp. at 1412-13 (district court findings regarding privacy). Regarding the inappropriateness of the adversative method for women, the Fourth

the argument focused on learning style and emotional development differences between girls and boys, with an operative assumption that what was good for boys was not useful for girls, and vice versa.¹⁰⁰ "Established differences in the educational needs" of men and women justified sex-segregated education, the Fourth Circuit concluded.¹⁰¹

If the judges had used an analytic framework that focused more on scrutinizing the masculine norm of VMI rather than examining women to ascertain how different they "really" are, they may have been more likely to comprehend that those aspects of VMI most arduously defended as unchanging and crucial to its mission were not that at all. In a thorough and fascinating history of VMI, Professor Dianne Avery has noted that the narrative of VMI as a tradition-bound institution that would be fundamentally undermined by change is an institutional myth, largely created and advanced by the VMI alumni for the litigation out of a blind opposition to admitting women.¹⁰² The adversative educational method of the rat line, in which upperclass cadets harass, haze, and cruelly break down the self-esteem of new cadets, is not the official educational policy of the institution. Rather, it is an ever-changing creation of the cadets themselves, and at times has been banned by school authorities, criticized by the faculty for being counterproductive to education, or strategically abandoned by the cadets.¹⁰³ For example, when after decades of resistance, black men were finally admitted to VMI, the school administration called for an end to the rat line practice after a few months,¹⁰⁴ and the institution changed some entrenched ceremonies in order to eliminate offensive celebrations of the old Dixie mentality.¹⁰⁵ It also instituted some academic support programs and student support groups that belie its argument that *any* differences in

Circuit, in *VMI II*, pontificated that "[i]f we were to place men and women into the adversative relationship inherent in the VMI program, we would destroy . . . any sense of decency that still permeates the relationship between the sexes." 44 F.3d 1229, 1239 (4th Cir. 1995).

100. See *VMI II*, 852 F. Supp. 471, 477-481 (W.D. Va. 1994) (remedy decision).

101. See *Faulkner v. Jones*, 51 F.3d 440, 443 (4th Cir. 1995) (summarizing the court's holding in *VMI II*).

102. Avery, *supra* note 37, at 318-83.

103. *Id.* at 328-48.

104. *Id.* at 347.

105. *Id.* at 206.

the programs offered to different students will destroy an egalitarianism that is essential to the VMI ethic.¹⁰⁶

As for the supposedly vital norm of lack of privacy, Avery's careful history, and archival photographs, reveal the presence of window shades, as well as cadets ensconced from view of authorities behind closed room doors, where they engaged in prohibited practices like gambling, smoking, drinking, and sex.¹⁰⁷ Moreover, in the aftermath of World War II, married veterans re-applying to VMI were allowed to live with their wives, and were not forced into the fraternal atmosphere of the barracks.¹⁰⁸ On the subject of women cadets injecting sexual tension into the pristine atmosphere of VMI, cadet life is, as would be expected at a school with 1300 teenage boys, already rife with sexual escapades.¹⁰⁹ Nor do the women faculty, support staff, or summer school students already at VMI seem to have destroyed the sense of decency between the sexes.¹¹⁰

Professor Avery concludes that the "privacy" argument boils down to the desire to preserve cadet-initiated, male-bonding rituals, epitomized by the "shower run."¹¹¹ In this form of hazing, cadets are forced to run nude through showers of alternating freezing and scalding water temperatures, and they supposedly become bonded to each other "in their mutual experience of embarrassment, humiliation, and undoubtedly extreme discomfort, if not pain."¹¹² This sort of inane and dangerous ritual is not part of the official educational policy of the institution, just as there is no educational policy that the only way to become a citizen-soldier is to watch one's classmates undress, shower, and use the toilet.¹¹³ But the courts never thought to question whether these aspects of VMI culture, created by adolescent boys as a way of gaining a sense of mastery over other adolescent males, were so educationally essential that they justified keeping women out.

106. *Id.* at 208; see also *VMI I*, 766 F. Supp. 1407, 1436-37 (W.D. Va. 1991) (district court finds of fact).

107. Avery, *supra* note 37, at 352-53, 361-62.

108. *Id.* at 366.

109. *Id.* at 364-65.

110. *Id.* at 365.

111. *Id.* at 368.

112. *Id.* at 369.

113. *Id.* at 358-59.

Similarly, VMI's assertion that it could tolerate no distinctions in its physical education requirements collapses under the examining light of fact. VMI currently offers special programs, privileges, and relaxation of other aspects of physical education for its varsity athletes.¹¹⁴ It also offers remedial physical education and tailored programs for the large percentage of admitted men who cannot initially fulfill its fitness requirements.¹¹⁵ During World War II VMI also admitted physically disabled students and others who were not physically qualified for military service.¹¹⁶ The most brutal, and most assiduously masculine, physical experiences at VMI are not part of the school's actual physical education program, but rather are comprised by the brutal physical testing of "rats" that cadets devise for each other. These hazing tests are hardly uniform, but are individually varying, ad hoc, and arbitrary.¹¹⁷ They are not part of the official educational policy of the institution; they are simply ways anxious, immature boys have devised for harassing each other and for picking on those they resent, or perceive as weak or different.¹¹⁸

If the courts had been less seduced by the presumed naturalness and inevitability of the existing norm of VMI, they might also have been more willing to inquire into whether the aspects of the VMI culture so ardently defended by the alumni association and board of visitors were really sound educational policy for producing the type of leaders needed by today's military, professions, and corporations. They would have realized that there was much more involved in challenging VMI than the issue of whether a few "exceptional," masculine women should be able to go there. While there was extensive examination of the educational soundness of the core components of the parallel women's program, VWIL, the judges dismissed, or their

114. *Id.* at 379-80.

115. *Id.* at 383.

116. *Id.* at 383-84.

117. *Id.* at 381.

118. *Id.* at 382. Much-decorated military veteran David Hackworth emphasized this point in his *Newsweek* column, noting that the physical incentive training the Marines administer in boot camp, under the eyes of trained military instructors, is "a far cry from making a cadet double-time in the gutter or playing Russian roulette on his chest with a staple gun. There's a difference between a 20-year-old getting off on harassing people and a well-honed machine led by old-salt, professionally trained [drill instructors]." David H. Hackworth, *How to Make a Real Warrior—Military: In the Marines, It's Training—Not Hazing*, NEWSWEEK, Sept. 4, 1995, at 28.

framework did not permit them to hear, the experts who testified that VWIL was a better program for preparing both men and women to be leaders, and would be preferred over a VMI-type program by many men.¹¹⁹ Nor did the judges take cognizance of the testimony that there was no educational theory or policy that recommended the adversative method as appropriate for men as well as women.¹²⁰ Rather than grasping the import of testimony about how the military service academies, such as West Point, had changed their training methods upon admitting women, the district judge saw this as proof of the harm that would befall VMI if it too had to bring women into its ranks.¹²¹ The point of this testimony was that the service academies had to change in order to stay current with the needs of the mixed-gender military and civilian society for leaders well adapted to modern warfare, modern competition, and employee motivation. A norm adopted for an outmoded world is not worth preserving.

Just as the courts did not examine whether what VMI taught about how to be a leader—haze, brutalize, and dominate others, yell at and do not listen to others, drive out the different, beat self-esteem out of people, preserve inane and dangerous rituals, resist change and cling to outmoded tradition—was well suited for leadership training, they also did not inquire into the health of what the VMI culture taught boys about being men. The virulent notion of hyper-masculinity implicit in VMI and The Citadel perpetuates a stereotyped notion that “real men” are aggressive, assaultive of and demeaning towards others, can bond only through shared physical adversity and not through emotional empathy or intellectual respect, and should despise the “weak” and feminine within themselves and others. It is no accident that one form of the verbal abuse heaped on cadets is to castigate them for being “sissies,” “pussies,” or “fucking little girls.”¹²² Any perceived weakness along stereotyped lines of masculinity, including being “too nice,” or caring, or showing emotion, are derided in feminine and homophobic terms.¹²³

119. Avery, *supra* note 37, at 226.

120. *Id.* at 308-09.

121. *VMI I*, 766 F. Supp. 1407, 1440-41 (W.D. Va. 1991).

122. See, e.g., Faludi, *supra* note 69, at 69-70.

123. *Id.*; see also Reilly, *supra* note 69. Shannon Faulkner was harassed for stepping out of her perceived gender boundaries. She was labelled a dyke, whore, slut, “lesbo,” an ugly whale, the “divine bovine,” “Mrs. Doubtgender,” and the “bitch” inappropriately trying to lead the pack of dogs. See Brinson, *supra* note 51, at 48.

Further highlighting this anxious need to preserve a sharply hierarchical line between proper men and women, women who attempt to excel in traditionally male domains like VMI and The Citadel, are also frequently reviled in sexualized terms that call both their femininity and sexuality into question.¹²⁴

If these pathologically gendered aspects of the VMI and Citadel culture had been examined, instead of reacting with horror at the prospect of change, the lower courts may have viewed the prospect of changing the culture as the very best argument for admitting women. By having to deal with women in their midst, the cadets might have learned that women can be masculine like men, men can be feminine like women, both can be enhanced by displaying some of the opposite gendered traits, and neither should be despised for doing so.¹²⁵ By having to refrain from certain sexualized types of hazing rituals, or to learn to comprehend the harm experienced by women subjected to such behavior, the male cadets might have been less likely to come out of VMI or The Citadel as walking sexual harassment liability nightmares for prospective employers, or as potentially abusive intimate partners, or hated ogre bosses.

VMI itself was not the only unexamined norm in the litigation. Single-sex education was also embraced as a valid public norm without any meaningful scrutiny of its social meaning or effect. Just as the majority in *Plessy* hid behind the presumed neutrality of the norm of racial segregation—it affected blacks and whites alike, and was for their mutual social good—the lower court judges in the VMI and Citadel cases assumed that any benefits of single-sex education flow equally to men and women.¹²⁶ With single-sex education thus characterized as a sex-neutral educational good, it is hardly surprising that the

124. See, e.g., Michelle M. Benecke & Kirsten S. Dodge, *Military Women in Nontraditional Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 HARV. WOMEN'S L.J. 215, 234, 237 (1992); Lani Guinier, Michelle Fine & Jane Balin, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 52 (1994) (noting that the abuse women in law school receive from male peers is often explicitly sexual and homophobic, a technique for putting women in their place).

125. As Katherine Franke argues, "Shannon Faulkner's brief attendance at The Citadel is still revolutionary because it creates the cultural conditions for masculinity to be separated from maleness and be remapped onto the female body. This is a deeply radical move given the accepted cultural norm that regards masculinity as a reliable and coherent signifier of femaleness." Franke, *supra* note 7, at 87.

126. See *VMI I*, 766 F. Supp. 1407, 1411-12 (W.D. Va. 1991).

courts deemed it a legitimate governmental objective that could support a sex-based classification.

The district court in the VMI case, selectively sifting through expert opinions, found as a "fact" that single-sex education is beneficial to both sexes.¹²⁷ Both the district court's and the Fourth Circuit's summary of this "fact" are written in religiously sex-neutral terms. For example, the courts refer to a "multitude of professional articles describing the benefits of single-gender education" and a "public [that is] increasingly seeking admission to single-gender colleges."¹²⁸ From these descriptions, one would think that the "multitude" of articles examine both all-female and all-male schools and that the "public" clamoring for single-sex education was equally comprised of men and women. But these studies and this public are not sex-neutral at all—virtually all surviving single-sex colleges are female, the contemporary literature of single-sex higher education focuses on the benefits to women of all-female colleges, and it is the enrollments of all-female colleges that are growing.¹²⁹ The current research demonstrates that the efficacy of single-sex education may be sex-specific—limited to young women—because it offers an environment free from female-specific forms of educational discrimination, such as silencing, discouragement, and male-peer harassment.¹³⁰ The reasons single-sex education can benefit young women obviously do not apply to men, and neither does the argument that limiting enrollment to one sex may be necessary to ameliorate the lingering effects of societal discrimination and devaluation.¹³¹

127. *Id.*

128. *VMI II*, 44 F.3d 1229, 1238 (4th Cir. 1995).

129. For descriptions of these studies, see Avery, *supra* note 37; Gilligan Amicus Brief, *supra* note 36. For a listing of existing single-sex colleges in the United States, all but a handful of which are all-female, see Brief of Amicus Curiae States for the Commonwealth of Virginia, *United States v. Commonwealth of Virginia* (U.S.) (Nos. 94-1941, 94-2107) (filed Dec. 15, 1995). In addition to VMI and The Citadel, one of the remaining all-male colleges is private, military-style Valley Forge Military College in Pennsylvania. Some of the others are religious institutions, or historically black schools, such as Morehouse College, that have companion all-female historically black schools.

130. See, e.g., Gilligan Amicus Brief, *supra* note 36.

131. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (offering benefits to women as a possible legitimate governmental justification for single-sex higher education).

Indeed, rather than benefitting men, the studies suggest a neutral or even negative effect on achievement, attitudes, and behavior from all-male education. As one study noted, "the classroom effects for male and female students are quite different. Coeducational classrooms appear to enhance male achievement, whereas single-sex classrooms appear to enhance female achievement."¹³² Other studies document elevated incidents of sexism and expressions of derogatory attitudes about women in all-male educational settings.¹³³ As Professor David Reisman, who testified for VMI, noted in an earlier book, all-male educational institutions are "likely to be a witting or unwitting device for preserving tacit assumptions of male superiority."¹³⁴

By relying on studies about the benefits of single-sex education for women, and extrapolating those results as if they could be applied wholesale to men, the lower courts in VMI committed the reverse of the usual gender-biased scientific error. Similarly, the stance of neutrality was anything but neutral. It masked beneath a veneer of sound, scientifically supported educational policy what was at bottom nothing more than an intense effort by a privileged all-male institution to keep its culture unrelievedly masculine and to guard its riches and connections only for the chosen boys. VMI wanted to keep female gatecrashers from destroying their fraternity-like celebration of masculinity.¹³⁵ As

132. Emanuel Jimenez & Marlaine Lockheed, *Enhancing Girls Education Through Single-Sex Education: Evidence and a Policy Conundrum*, 11 EDUC. EVAL. & POL'Y ANAL. 117, 125 (1989).

133. Valerie Lee et al., *Sexism in Single-Sex and Coeducational Independent Secondary School Classrooms*, 67 SOC. EDUC. 97 (1994); Valerie Lee, *Single-Sex Schooling: What is the Issue?*, in U.S. DEPT OF EDUC., SINGLE SEX SCHOOLING: PROPONENTS SPEAK, A SPECIAL REPORT FROM THE OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT 43-44 (D. Hollinger & R. Adamson eds., 1993); Cornelius Riordan, *The Case for Single-Sex Schools*, in U.S. DEPT OF EDUC., SINGLE SEX SCHOOLING: PROPONENTS SPEAK, A SPECIAL REPORT FROM THE OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT 48 (D. Hollinger & R. Adamson eds., 1993) (stating that results of studies on effects of male-only education are "generally null or negative," at least for white males).

134. CHRISTOPHER JENCKS & DAVID REISMAN, *THE ACADEMIC REVOLUTION* 297-98 (1968). This insight takes on added force when one considers the historical origins of women's colleges as an antidote to the fact that virtually all the prestigious institutions of higher education were limited to men. The women's colleges, rather than aspiring to be exact duplicates of the men's colleges, aspired to train women for their limited social role as wives and mothers. See RHODE, *supra* note 11; Lewis, *supra* note 10, at 598-602.

135. Fourth Circuit Judge Hamilton, dissenting from the opinion that ordered

Judge Hall observed, concurring in the ordered admission of Shannon Faulkner to The Citadel, "though VMI, The Citadel, and their advocates have ceaselessly insisted that education is at the heart of this debate, I suspect that these cases have very little to do with education. They instead have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later."¹³⁶

Once the courts went down the familiar doctrinal path of assumed neutrality and failure to scrutinize the operative norm, maintaining "gender homogeneity" became an accepted goal. Further insisting on the neutrality of this position, the Fourth Circuit concluded that "[i]t is not the maleness, as distinguished from femaleness, that provides justification for the program. It is the homogeneity of gender in the process, regardless of which sex is considered"¹³⁷ Through this reasoning legerdemain, the very fact that VMI was all male became the most irrefutable argument for keeping it that way. If what women were seeking was the true "VMI experience," which was by definition an all-male experience, the presence of women would destroy the opportunity women said they wanted.¹³⁸ Just as in *Plessy*, where the existing legal and social arrangements of racial segregation were their own best argument for maintaining things that way, a history of keeping girls out became self-justifying and self-perpetuating. Just as *Plessy* himself was chided for trying to be white, the women who want to go to VMI and The Citadel are being told that they simply cannot be men, so stop wanting to be, and stop trying to be.

The government in the VMI case tried to dance around the Catch-22 argument that women would destroy the gender homogeneity that was the essence of the institution, equivocating about how much significant change would really have to happen if women were admitted.¹³⁹ In the end, this trap, set by the

Shannon Faulkner's admission to The Citadel, vituperatively referred to her as a publicity-hungry malcontent, who, rather than accepting her lot to go to a women's leadership school, wanted "to gatecrash her way" into the school in order to "destroy[] the unique nature of The Citadel." *Faulkner v. Jones*, 51 F.3d 440, 456 (4th Cir. 1995) (Hamilton, J., dissenting).

136. *Faulkner*, 51 F.3d at 451 (Hall, J., concurring).

137. *VMI I*, 976 F.2d 890, 897 (4th Cir. 1992).

138. The Fourth Circuit called this "the Catch-22" of the case. *Id.* For an enlightening unraveling of the conundrums of this Catch-22 argument, see Avery, *supra* note 37, at 318-83.

139. *VMI I*, 766 F. Supp. 1407, 1412 (W.D. Va. 1991).

Plessy-like doctrinal framework of sex equality jurisprudence, forced the government attorneys to get into a losing battle over how different women "really" were from men. This is a losing battle because the story of essential difference is a more familiar one and, thus, more likely to be heard. It is also an uphill struggle because it keeps women constantly defined in contrast to men, rather than in all their rich individuality and contextuality. Ultimately, the doctrinal trap that closed around women in the VMI litigation is a familiar one. As Martha Minow has trenchantly noted, when faced with backlash over past victories, women

are more likely than ever to attempt to frame conventional arguments that can succeed in the courts and legislatures, both of which enshrine convention. Arguments that women are just like men—and deserve to be treated like men—reappear when legal and political authorities reject arguments that mainstream institutions should be revamped to include women's experiences.

...[But] our own efforts at reform become most vulnerable to the version of reality that has in the past excluded us. We risk becoming tokens, and taking our meanings and identities from those who have let us in.¹⁴⁰

IV. THE ROAD NOT TAKEN: ANTI-SUBORDINATION AS THE PROPER MEANING OF EQUAL PROTECTION

The familiar doctrinal arguments of sex equality jurisprudence can often function in this trap-like, "one step forward, two steps back" fashion because, like the majority in *Plessy*, courts and advocates rarely seriously wrestle with the call of Justice Harlan's dissent: the adoption of an anti-subordination approach to sex equality. Although Justice Harlan's dissent in *Plessy* is often characterized as merely advocating color-blindness, no matter what the context, the scholarly analyses of his opinion that reveal it as about an anti-subordination, or anti-caste approach to the meaning of the Equal Protection Clause are quite compelling.¹⁴¹ Justice Harlan's phrase "[o]ur Constitution is

140. Martha Minow, *Feminist Reason: Getting It and Losing It*, reprinted in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 357, 361-62 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

141. The most thorough analysis of Justice Harlan's dissent taking an anti-caste position is T. Alexander Aleinikoff, *Re-Reading Justice Harlan's Dissent in Plessy v.*

color-blind" is bracketed by language analyzing domination by the white race, and then positing that "in the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. . . . In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful."¹⁴²

An anti-subordination approach to equality can be variously defined, but all definitions have at their heart a contextual effort to analyze power dynamics, systems, attitudes, and practices that operate explicitly or implicitly to maintain social, economic, and political dominance by one group over another. The point is not simply difference, but the cultural constructions and hierarchies of power that have caused differences to be interpreted as inherent and as better or worse on a hierarchy of social value and domination.¹⁴³ As Professor Cass Sunstein defines it, "the motivating idea behind an anticaste principle is that *without good reason, social and legal structures should not turn differences that are both highly visible and irrelevant from the moral point of view into systematic social disadvantages*."¹⁴⁴ Political theorist Iris Young has noted that subordination does not always operate because of overt prejudice or explicit legal classifications that benefit the ruling group. Instead, it can be comprised of "the vast and deep injustices some groups suffer as a consequence of often unconscious assumptions and reactions of well-meaning people in ordinary interactions, media and cultural stereotypes, and structural features of bureaucratic hierarchies and market mechanisms—in short, the normal processes of everyday life."¹⁴⁵

Ferguson: *Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961. See also T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060 (1991); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2428-44 (1994).

142. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Harlan also insisted that the Louisiana statute at issue in *Plessy* violated the Thirteenth Amendment because it was in fact an integral aspect of a system of domination, or caste. *Id.*

143. See MacKinnon, *supra* note 85.

144. Sunstein, *supra* note 141, at 2429 (emphasis in original). In my view, Sunstein's definition is too constrained to capture the full phenomenon of gender subordination. By focusing on "highly visible" differences, he is conflating biological sex into culturally constructed gender roles, thus obscuring the importance of the latter. Moreover, men do not always look like men, and women do not always look like women. See, e.g., Case, *supra* note 28; Franke, *supra* note 7.

145. IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 41 (1990).

An anti-subordination understanding of the goal of equality transcends the supposedly oppositional status of the individualistic focus of the similarly situated approach and the countervailing "group-based discrimination" approach, because it can embrace both depending on the context. It also overarches the "sameness-difference" debate in which sex equality jurisprudence has been mired, because it does not put the question in those terms. Thus, it can recognize that sometimes facial distinctions along race or gender lines are subordinating, but sometimes presumed neutrality can be subordinating.¹⁴⁶ Sometimes, as in the VMI case, the combination of an obsession about difference for some elements, coupled with a blind neutrality for others—the simultaneous inability to recognize both the individualism and group characteristics of men and women—creates the subordination.

In the race area, the anti-subordination approach has had some moments of serious engagement—notably in *Brown v. Board of Education*,¹⁴⁷ when the Court focused on the white supremacist origin of school segregation and its concomitant stigmatizing and subordinating impact on blacks.¹⁴⁸ The Court also seemed to be moving firmly in this direction in *Loving v. Virginia*,¹⁴⁹ when it noted that anti-miscegenation laws were rooted in white supremacy and held that elimination of white supremacist practices was the central goal of the post-Civil War amendments.¹⁵⁰ However, the Supreme Court has largely abandoned that road, and it now insists on color-blindness most vociferously when to do so fosters the continued political and economic subordination of blacks.¹⁵¹

In the arena of sex equality, there have been hints of adopting an anti-subordination approach, but so far it is largely lip service. Too often the discussion is reduced to one about "outmoded and archaic" stereotypes, as if they, rather than power, masculinist supremacy, the devaluation of the feminine, and the frequently

146. See, e.g., Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).

147. 347 U.S. 483 (1954).

148. See Aleinikoff, *supra* note 141, at 971; Charles Black, *The Lawfulness of the Segregation Doctrine*, 69 YALE L.J. 421 (1960).

149. 388 U.S. 1 (1967).

150. *Id.* at 10.

151. See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

differential opportunities facing men and women, were the real issue.

The Court seems to have come closest to an anti-subordination understanding of sex equality law in its recent decision in *J.E.B. v. Alabama ex rel. T.B.*,¹⁵² striking down the use of sex-based peremptory challenges to prospective jurors. Rather than simply resting with the proposition that men and women are similarly situated with regard to their ability and right to sit on juries, the Court discussed the history of women's exclusion from juries and other aspects of civil and political life, and the injustice of this exclusion.¹⁵³ But there the Court stopped short. It did not probe into the subordination or second-class citizenship status wrought by these exclusions, and their lingering effects today. It did not inquire deeply into whether sex-based peremptory strikes today, with legal exclusion removed and many majority female juries, foster the subordination of women, and if so, how. Its grasp of the context was oddly askew—the petitioner was actually a male defendant in a paternity action whose counsel had been the one to strike women off the jury.¹⁵⁴ His complaint was that the prosecution had stricken *men*, so that he wound up with an undesirable all-female jury.¹⁵⁵ Under the banner of women's rights, the petitioner wanted no women on his jury. This left the majority wide open to Justice Scalia's caustic observation in dissent that in an effort to be "politically correct," the majority condemned the history of discrimination against women in order to sanction the state for discriminating against men.¹⁵⁶

What the Court kept being pulled back to in *J.E.B.* was stereotyping per se, as a practice that even when generally socially accurate, "reinforce[s] prejudicial views of the relative abilities of men and women."¹⁵⁷ This insistence that sex not be used as a proxy for experiences, for class, or for reasoning orientation will generally be beneficial to women; however, the opinion sounds a lot more like the color-blind approach, with its insistence that while sex and gender might matter a lot in fact, they should not matter in law. This left Justice O'Connor

152. 511 U.S. 127, 114 S. Ct. 1419 (1994).

153. *Id.* at 1422-23.

154. *Id.* at 1421.

155. *Id.* at 1422.

156. *Id.* at 1436 (Scalia, J., dissenting).

157. *Id.* at 1427.

wistfully worrying in her concurrence whether “in the name of fighting gender discrimination, [we will] hold that the battered wife—on trial for wounding her abusive husband— . . . [will be] preclude[d] . . . from using her peremptory challenges to ensure that the jury of her peers contains as many women members as possible.”¹⁵⁸

The focus on stereotypes and whether they are inaccurate or actually based on “real” differences is an incomplete step towards an anti-subordination approach because it is locked within a comparative equality framework—equality issues will only be seen when there are exactly situated men for comparison. Furthermore, it keeps the focus on women rather than on the operative male-normed institutions.¹⁵⁹ Institutions and practices that pervasively and disproportionately affect women, such as sexual assault, battering, sexual objectification, workplaces inhospitable to pregnancy and childrearing, and attacks on abortion providers, clinics, and patients, are not likely to be understood as equality problems under the anti-stereotype approach. But they are seen as central practices to inequality under an anti-subordination approach.

The anti-subordination approach has been most resisted in sex equality jurisprudence when the challenged practice or institution seems most imbued with the biological differences of reproduction,¹⁶⁰ or as in the VMI and The Citadel cases, when it is most connected to a core preserve of male power and its linkage to central notions of masculinity and masculine pride.¹⁶¹

158. *Id.* at 1433 (O'Connor, J., concurring).

159. *See, e.g.,* Finley, *supra* note 48.

160. For example, the Supreme Court continues to insist that discrimination on the basis of pregnancy does not pose a constitutional sex equality problem, precisely because there are no “similarly situated” men for comparing whether there is differential treatment. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271-73 (1993) (holding that *Geduldig v. Aiello*, 417 U.S. 484 (1974), is still good constitutional law, and that “the disfavoring of abortion . . . is not *ipso facto* sex discrimination” because only women seek abortions). Ironically, three members of the Court came closest to adopting an anti-subordination approach in another recent abortion case, *Planned Parenthood v. Casey*, when they articulated how the prohibition of abortion, and the disparate control over their reproductive lives experienced by women, contributes to their social and economic subordination. *See* 505 U.S. 833, 852, 856 (1992) (joint opinion of Kennedy, O'Connor, & Souter, JJ.). Any apparent insight gained by Justice Kennedy, however, was soon abandoned in *Bray*, where he joined the majority. *See Bray*, 506 U.S. 263 (1993).

161. Wendy Williams has observed that our society “draw[s] the line and refuse[s] to proceed further with gender equality” when it runs into things identified as

The military and the military-parodying institutions of VMI and The Citadel are at the heart of what it means to "be a man" in our culture. As Kenneth Karst has argued, analyzing the "unifying theme" of race, sex, and sexual-orientation based exclusions in the military,

[t]hat unifying theme is the pursuit of manhood. Manhood, of course, has no existence except as it is expressed and perceived. The pursuit of manhood is an expressive undertaking, a series of dramatic performances. Masculinity is traditionally defined around the idea of power; the armed forces are the nation's preeminent symbol of power; and, not incidentally, "the Marines are looking for a few good men."¹⁶²

Not coincidentally, VMI defines its mission as producing "citizen-soldiers," who are defined as "educated and honorable *men* who are suited for leadership in civilian life and who can provide military leadership when necessary."¹⁶³

Our society, and legal system that reflects it, continues to embrace separate but equal or separate spheres ideology, and to shy away from anti-subordination analysis in areas along the sexual frontier, because we do not really see patriarchal hierarchy and its companion, masculinist supremacy, as harmful. Instead, we continue to devalue the qualities and experiences associated with the feminine, and with women. Especially among those who hold power, there is an anxious clinging to an essentialized notion of masculinity whose very purpose is to determine the deserving—the very best. More often than not, as is evident at VMI and The Citadel, these notions of masculinity and the right of masculine privilege are fundamentally linked to being male. Manhood is defined as the antithesis of being feminine, and the prospect of any women succeeding at ultimate tests of manhood, like the VMI and Citadel programs, is palpably, violently threatening to anxious male identity. Karst explains:

"quintessentially masculine" at "the locus of traditional masculine pride and self-identity," namely, the military, physical combat, and its offshoot, contact sports. Williams, *supra* note 19, at 183.

162. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 U.C.L.A. L. REV. 499, 500-01 (1991) (footnote omitted).

163. *VMI I*, 766 F. Supp. 1407, 1425 (N.D. Va. 1991) (emphasis added).

The heart of the ideology of masculinity is the belief that power rightfully belongs to the masculine—that is, to those who display the traits traditionally called masculine. This belief has two corollaries. The first is that the gender line must be clearly drawn, and the second is that power is rightfully distributed among the masculine in proportion to their masculinity, as determined not merely by their physical stature or aggressiveness, but more generally by their ability to dominate and to avoid being dominated.¹⁶⁴

This is why an all-male VMI and The Citadel, and their companion all female versions, violate the anti-subordination principle of equality. It is not their single-sex basis per se, but their role in preserving a haven for a dominating and anti-female understanding of men and masculinity. They are inextricably part of a system of male privilege because they teach men to hate the feminine within themselves and within women. They tell women they can only be a feminine type of leader, and that will always be less than a masculine leader. They foster a culture that is so violently committed to maintaining an essentialized divide between men and women that young men revile women in sexually derogatory terms for trying to be masculine like them. Not all single-sex institutions will automatically fall under an anti-subordination analysis. Those that seek to encourage and empower the traditionally subordinate, to give them a safe space to flourish, may actually foster the anti-subordination principle. But institutions like VMI and The Citadel, paired with their corresponding “cute” and “nice” girl’s versions, can do nothing but perpetuate subordination along both sex and gender lines. Their very purpose for being is to powerfully signal that masculinity is only for men, and femininity is only for women, and that one way of being is definitely better and more socially powerful than the other.

This is why the struggle to desegregate VMI and The Citadel is more than symbolic. Just as the segregation policy that *Plessy* challenged was at the heart of white supremacy, these institutions are more than the last, desperate bastions of a dying Southern tradition. They are demonstrations of the enduring nature of masculinist supremacy—a system only further

164. Karst, *supra* note 162, at 505.

entrenched by the “remedy” of creating separate women’s versions.